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ALEXANDER L. STEVAS,
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No. 80-2157

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

ANCHORAGE TIMES PUBLISHING CO., PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. The assertion made by the respondent in its brief that the issue of "changed circumstances" was first raised by the petitioner, Anchorage Times Publishing Company, before the Ninth Circuit in its petition for rehearing (Resp. 6) is not correct. The petitioner raised the issue in a supplemental brief before oral argument was heard by the court. By letter dated April 29, 1980,[1] the petitioner supplemented its argument by specifically referring to the issue of "changed circumstances" and citing in support the opinion styled *NLRB v. Western Drug*, 600 F.2d 1134 (9th Cir. 1979). In addition, the issue of changed circumstances, including employee turnover, was a part of the petitioner's oral argument before the court. Therefore, the

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[1]The petitioner has requested the Clerk of Court, Ninth Circuit Court of Appeals, on July 24, 1981 to certify and transmit that letter as a part of the record to this Court.

respondent's contention that the issue of changed circumstances is not properly presented to this court is incorrect.[1]

2. Petitioner believes the issue of changed circumstances should have been considered and applied by the Ninth Circuit. Moreover, even if the "hallmark violation test" of *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980), is applied, as suggested by the respondent (Resp. 7-8), it is deficient in supporting the enforcement of a bargaining order because there exists a "significant mitigating circumstance" of changed circumstances, including employee turnover, management turnover and lapse of time. Changed circumstances, including "passage of time" and new employees, were sufficient factors in the very recent opinion of the Sixth Circuit to weigh against the enforcement of a bargaining order, notwithstanding the existence of unfair labor practices similar to those found to have been committed by the petitioner. *NLRB v. Frederick's Foodland*, 107 L.R.R.M. 3216 (6th Cir. 1981).

Respectfully submitted,

DOUGLAS A. RIGGS
Attorney for Petitioner

AUGUST 1981

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[1]The petitioner does not take the position that the ALJ or the NLRB erred in not considering the changed circumstances of employee turnover for the simple reason the issue was not before them. The magnitude of employee turnover was not known at the time of trial before the ALJ nor at the time the ALJ's recommendation was considered by the NLRB. However, on the petition to review and cross-application to enforce the decision of the NLRB, the petitioner asked the Ninth Circuit to either consider the changed circumstances and/or order additional evidence be taken pursuant to 29 U.S.C.A. § 160(e).